

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In re Applications of

MM DOCKET NO. 93-42

MOONBEAM, INC.

File No. BPH-911115MG

GARY E. WILLSON

File No. BPH-911115MO

For a Construction Permit
 New FM Station on Channel 265A
 in Calistoga, California

RECEIVED

TO: The Honorable Edward Luton
 Administrative Law Judge

MAY 14 1993

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

SECOND PETITION TO ENLARGE ISSUES

Gary E. Willson (Willson) pursuant to Rule 1.229 files this Second Petition to Enlarge Issues against Moonbeam, Inc. (Moonbeam). Willson seeks addition of financial qualifications and false financial certification issues against Moonbeam.









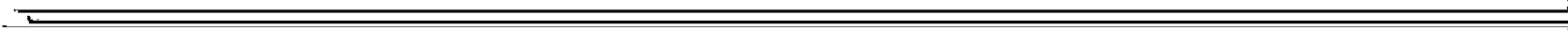













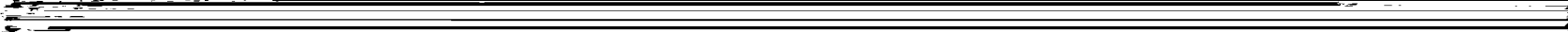






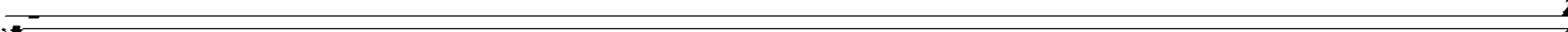

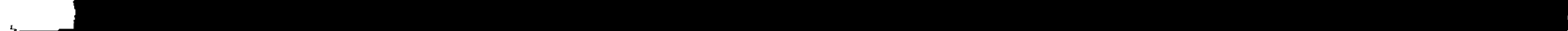




A. Background.**1. The Original Application.**

Moonbeam filed its application on November 15, 1991. Moonbeam certified in Section 3 - Financial Qualifications, that it was financially qualified, estimating the total funds necessary to construct and operate the facility for 3 months without revenue at \$95,000. The source of these funds was identified as Mr. A. Langworth Manion, Alex Brown & Sons, Inc., 345 California Street, San Francisco, CA 94104. He was described as a banker who would provide \$100,000 in funding. See Exhibit 1.

In response to documents produced pursuant to the standardized document production requirement, Moonbeam produced a

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 List A B C D E

statement of account with Alex Brown & Sons, Inc. The account was in the name of Mary F. Constant, Abbie & Bianco Retirement Fund showing the total net value in the account of \$190,873.18. The statement was for the period November 30 through December 31, 1991, a time period following the filing and certification of the application. See Exhibit 2. Although Standard Document Production Rule 1.225(c)(1)(v) requires production of "all bank



Documents requested in his First Request for Production of Supplemental Documents from Moonbeam, Inc. Some of the documents requested relate to finances.

C. Argument.

Based on the evidence adduced to date, a financial qualifications and false financial certification issue should be added. In its application filed on November 15, 1991, Moonbeam certified that it was financially qualified relying on funds from Alex Brown & Sons. No financial documents indicating that such funds are available to Moonbeam have been produced as required. Indeed, the one document that was produced raises additional questions. The statement of account of Alex Brown & Sons, for the period November 30 through December 31, 1991, is an account held by Mary F. Constant, Abbie & Bianco Retirement Fund. Nowhere in either the original application or the amended application is a retirement account identified as the source of funding. Furthermore, even if it had been, the November 30 through December 31, 1991 statement of account covers a time period subsequent to filing of the original application and fails to demonstrate Moonbeam was financially qualified at the time its application was filed. There is no statement of account of any funds held by Moonbeam and there is no agreement to provide funding to Moonbeam by Mary F. Constant, Abbie & Bianco Retirement Fund, or any other source.

Moonbeam amended its application on March 2, 1992 to change the source of funding from Alex Brown & Sons to Mary F. Constant.

An applicant, of course, must be financially qualified at the time it files its application and any subsequent certification cannot correct that deficiency. See Maria M. Ochoa, 7 FCC Rcd. 6569 at ¶18 (Rev. Bd. 1992)("An applicant faced with a financial qualifications, as opposed to a financial misrepresentation issue, must show objectively that it actually had reasonable assurance of funds at the time of certification"). See also Pontchartrain, ___ FCC Rcd. ___ at ¶8 (Comm. March 31, 1993). Here, however, even the amended financial certification raises more questions about Moonbeam's financial qualifications. No financing agreement of any kind has been produced indicating funds will be made available to Moonbeam, Inc. by Mary Constant. Indeed, in response to Willson's First Request for Production of Supplemental Documents from Moonbeam, Inc., Moonbeam admits there are no agreements to loan or provide funds to Moonbeam by Alex Brown & Sons, Mary Constant, or any other individual or entity to construct and operate the station.¹ Moonbeam also disclosed for

¹ In his First Request for Production of Supplemental

the first time in response to Willson's First Request For Production of Supplemental Documents from Moonbeam, Inc. that, "Mary F. Constant does not have an individual financial statement." See Exhibit 5. "Financial statement" was defined in Willson's Request for Documents as, "a financial statement or other similar documents which separately or in combination reveal liabilities and assets." Moonbeam produced nothing in this regard with respect to Mary F. Constant only objecting to providing a financial statement for Mr. Constant. See Exhibit 5. It appears then that, although Mary F. Constant was to be the source of funding as of the time the application was amended March 2, 1992, she had no financial statement to support her ability to loan the requisite funds as required. Further undermining this ability is a tax lien filed by the State of California against Mary Constant and Fred Constant, her husband, in the amount of \$13,291.40.² See Exhibit 6.

In sum, the evidence demonstrates:

1. There are no agreements to loan or provide funds to Moonbeam by Mary Constant, Alex Brown & Sons or any other entity or individual.
2. Mary Constant has no financial statement supporting her ability to provide Moonbeam, Inc. \$100,000.
3. There is at least one outstanding tax lien against Mary Constant undermining her financial credibility.

² There are also outstanding tax liens against Constant Communications of Oregon, Inc., the former licensee of several stations and a company owned by Fred Constant. Although neither Mr. Constant nor Constant Communications is identified as a source of funds, the tax liens could have an affect on the availability of community property owned by Mary Constant.

4. A document produced by Moonbeam to support the availability of funds from Alex Brown & Sons, a banker, references a retirement account in the name of Abbie & Bianco. This account statement covers a period subsequent to the time the application was filed.

Commission precedent requires addition of the requested issues. Four years ago in an effort to thwart the widespread abuses of the certification procedures, the Commission acted to firm up its financial requirements. Revision of Application for Construction Permit for Commercial Broadcast Stations (FCC Form 301), 4 FCC Rcd. 3853, 3859 (1989). The Commission revised the financial qualifications portion of the 301 and required applicants to provide additional data. The Commission required applicants to have on hand certain written financial documents, although these documents were not required to be filed with the Commission. The instructions for Section 3, Financial Qualifications of FCC Form 301 in part provides:

- (3) The applicant must also have on hand at the time it files its application, BUT NEED NOT SUBMIT WITH THE APPLICATION, the following documentation:

- (a) For the applicant:

A detailed balance sheet at the close of a month within 90 days of the date of the application showing the applicant's financial position.

A statement showing the yearly net income, after federal income tax, for each of the past two years, received by the applicant from any source.

- (b) For each person identified in response to Question 3, Section III, who has already furnished funds, purchased stock, extended credit, or guaranteed loans:

A copy of the agreement obligating the party to furnish funds, showing the amount furnished, the rate of interest, the terms of repayment, and security, if any.

- (c) For each person identified in response to Question 3, Section III, who has agreed to furnish funds, purchase stock, extend credit, or guarantee loans, a balance sheet or a financial statement showing:

All liabilities and current and liquid assets sufficient to meet current liabilities;

Financial ability to comply with the terms of the agreement to furnish funds, purchase stock, extend credit, or guarantee loans; and

Net income after Federal income tax, received for the past two years.

See Exhibit 7.

Mary Constant has already purchased stock in Moonbeam, as well as provided funds. As such, she should have a written agreement with Moonbeam, Inc. detailing the amount of money she is committed to providing, the rate of interest and terms of repayment and security, if any, etc. Moonbeam admits there is no such agreement. Also, since Mary Constant has agreed to furnish funds to Moonbeam, she is required to have on hand a balance sheet or financial statement. Again, this is an item Moonbeam admits does not exist. These are not insignificant omissions. The Commission requires that this written documentation be in existence at the time the financial certification is made. The requirement serves to ensure that an applicant has made the requisite commitment and engaged in the requisite due diligence to assure that it is financially qualified.

The lack of this required documentation is not the sole basis for adding the requested issues. Mary Constant, who is as of March 2, 1992 the sole source of funding for Moonbeam, had filed against her a \$13,291.40 tax lien in December 1992. This

raises significant and material questions concerning her ability to provide the requisite financing. It also raises the question of whether an applicant seeking a benefit from the government should be allowed to expend resources seeking that benefit when there are outstanding obligations owed to a governmental entity. In Las Americas Communications, Inc., 101 FCC2d 729, 731 (Rev. Bd. 1985), the Review Board added a financial issue against an applicant solely because a principal that was to provide 50 percent of the financing had an outstanding tax lien. The Review Board noted:

That certification was made at the very time that Ms. Garcia's federal income taxes remained unpaid. In light of representations by the applicant that Ms. Garcia has been contributing funds to meet half of the applicant's expenses and would share equally in all aspects of the station's operation, a substantial and material question is raised whether the above certification was correct at the time the application was filed and whether the applicant, in fact, is financially qualified. In this regard, we do not agree with Antonin & Garcia that because Comserv "has not the slightest idea of what [Antonin & Garcia's financial] plan might be," it has not met the pleading burden required of a party seeking additional issues (Reply to exceptions at 19). Under the Commission's current financial certification mechanism, a challenger will seldom have precise knowledge of what a competitor's financial plan is, and it would be an abdication of our qualifications approval responsibility if we were to immunize virtually every certificated financial proposal from scrutiny merely because a challenger could not describe an unreported proposal in detail and point to its deficiencies. We are convinced that a movant has met his prima facie burden where, as here, he demonstrates that a principal upon whom the applicant is relying, at least in important part, to meet its financial qualification is unable or unwilling to pay her taxes but at the same time has certified that the applicant is financially qualified.

Unlike the case in Las Americas, Mary Constant is not providing 50 percent of the financing, but 100 percent.

There are also substantial and material questions concerning Moonbeam's initial certification. There, Moonbeam certified that it would obtain the requisite funding from a banker, Alex Brown & Sons. Moonbeam admits there is no agreement from a bank or any other source to provide funding to Moonbeam. Moonbeam did submit an account statement in response to the standard document request which only further complicated matters. The statement, which is submitted to purportedly demonstrate Moonbeam's financial qualifications, was for a time period subsequent to the time the application was filed. More importantly, the statement was for the account of Mary Constant, Abbie & Bianco Retirement Account. Neither the retirement account, nor Mary Constant for that matter, was ever identified as a source of funding in the initial application. Also raised is the issue of whether the retirement account may even be used to construct and operate a radio station.

WHEREFORE, it is respectfully requested that the following issues be added in this proceeding:

1. To determine whether Moonbeam, Inc. is financially qualified to construct and operate the proposed new FM station in Calistoga and, if not, the effect thereof on Moonbeam's basic qualifications to be a Commission permittee/licensee.
2. To determine whether Moonbeam, Inc.'s President, Mary Constant falsely certified that Moonbeam, Inc. was financially qualified in the initial application filed November 15, 1991, and/or again in an amendment filed March 2, 1992 and, if so, the effect thereof on Moonbeam's basic qualifications to be a Commission permittee/licensee.

Willson further requests that, if the requested issue is added, Moonbeam be ordered to provide the supplemental discovery requested in Exhibit 8.

Respectfully submitted,

GARY E. WILLSON

GAMMON & GRANGE, P.C.
8280 Greensboro Drive
Seventh Floor
McLean, VA 22102-3807
(703) 761-5000

By 
A. Wray Fitch III
His Attorney

May 14, 1993

[0068/C93awf23Ret]

EXHIBIT 1

DUPLICATE

LAW OFFICES

HALEY, BADER & POTTS

SUITE 600

2000 M STREET, N.W.

WASHINGTON, D.C. 20036-3374

(202) 331-0606

TELECOPIER (202) 296-8679

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MARY A. McREYNOLDS
DAVID G. O'NEIL
JOHN M. PELKEY

KENNETH A. COX
MARY PRICE TAYLOR
COUNSEL

WILLIAM J. POTTS, JR.
RICHARD M. RIENL
SUSAN H. ROSENAT
DAWN M. SCIARRINO (NY)
LEE W. SHUBERT
HENRY A. SOLOMON
RICHARD H. STRODEL
JAMES M. TOWARNICKY
KATELEEN VICTORY
MELODIE A. VIRTUE

LARRY D. SUMNERVILLE
BROADCAST ANALYST

ANDREW G. HALEY
(1904-1966)

November 14, 1991

FCC/MELLON NOV 15 1991

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
Mass Media Services
P. O. Box 358195
Pittsburgh, PA 15251-5195

RE: FCC Form 301, Application for
New FM Station at Calistoga, CA

Dear Ms. Searcy:

Transmitted herewith, in triplicate, on behalf of
Moonbeam, Inc., is an application (FCC Form 301) for

APPLICATION FOR CONSTRUCTION PERMIT FOR COMMERCIAL BROADCAST STATION

For COMMISSION Fee Use Only

FEE NO:

FEE TYPE:

FEE AMT:

ID SEQ:

For APPLICANT Fee Use Only

Is a fee submitted with this application? ☐ Yes ☐ No

If fee exempt (see 47 C.F.R. Section 1.1112), indicate reason therefor (check one box):

☐ Noncommercial educational licensee

☐ Governmental entity

FOR COMMISSION USE ONLY

BPH-91115MG
FILE NO.

Section I - GENERAL INFORMATION

1. Name of Applicant

Moonbeam, Inc.

Street Address or P.O. Box
P.O. Box 526

City
Nicasio

State
CA

ZIP Code
94946

Telephone No. (Include Area Code)
(415) 662-2226

Send notices and communications to the following person at the address below:

Name

Mary F. Constant *
Moonbeam, Inc.

Street Address or P.O. Box
P.O. Box 526

City
Nicasio

State
CA

ZIP Code
94946

Telephone No. (Include Area Code)
(415) 662-2226

2. This application is for:

☐

AM

☒

FM

☐

TV

(a) Channel No. or Frequency

100.9
FM Channel 265

(b) Principal
Community

City

Calistoga

State

CA

(c) Check one of the following boxes:

☒

Application for NEW station

☐

MAJOR change in licensed facilities; call sign: _____

☐

MINOR change in licensed facilities; call sign: _____

☐

MAJOR modification of construction permit; call sign: _____

File No. of construction permit: _____

☐

MINOR modification of construction permit; call sign: _____

File No. of construction permit: _____

☐

AMENDMENT to pending application; Application file number: _____

NOTE: It is not necessary to use this form to amend a previously filed application. Should you do so, however, please submit only Section I and those other portions of the form that contain the amended information.

3. Is this application mutually exclusive with a renewal application?

☐

Yes

☒

No

If Yes, state:

Call letters

Community of License

City

State

*copy to: Lee W. Shubert, Esq/Haley, Bader & Potts
2000 M. Street, N.W., Suite 600, Washington DC 20036
(202) 331-0606

ON III - FINANCIAL QUALIFICATIONS

NOTE: If this application is for a change in an operating facility do not fill out this section.

1. The applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue.

☒ Yes ☐ No

2. State the total funds you estimate are necessary to construct and operate the requested facility for three months without revenue.

\$ 95,000.

3. Identify each source of funds, including the name, address, and telephone number of the source (and a contact person if the source is an entity), the relationship (if any) of the source to the applicant, and the amount of funds to be supplied by each source.

Source of Funds (Name and Address)	Telephone Number	Relationship	Amount
Mr. A. Langworth Manion Alex Brown & Sons 345 California Street San Francisco, CA 94104	(415) 544-2851	Banker	\$100,000.

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND IMPRISONMENT.
U.S. CODE, TITLE 18, SECTION 1001.

I certify that the statements in this application are true and correct to the best of my knowledge and belief, and are made in good faith.

Name of Applicant Moonbeam, Inc.	Signature <i>Mary H. Constant</i>
-------------------------------------	--------------------------------------

EXHIBIT 2

LAW OFFICES
HALEY, BADER & POTTS

4350 NORTH FAIRFAX DR., SUITE 900

ARLINGTON, VIRGINIA 22203-1633

TELEPHONE (703) 841-0606

FAX (703) 841-2345

POST OFFICE BOX 19006

WASHINGTON, D.C. 20036-9006

TELEPHONE

(202) 331-0606

SUSAN H. ROSENAU
ADMITTED IN D.C. ONLY

April 5, 1993

A. Wray Fitch III, Esquire
Gammon & Grange
8280 Greensboro Drive
7th Floor
McLean, Virginia 22102-3807

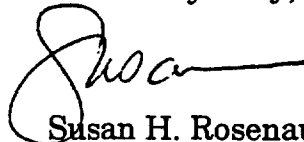
OUR FILE NO.
0992-102

Re: MM Docket No. 93-42, Calistoga, California

Dear Wray:

Pursuant to Section 1.325 of the Commission's Rules, enclosed please find the Standardized Document Production of Moonbeam, Inc. in the referenced proceeding.

Yours very truly,



Susan H. Rosenau

Enclosures

cc(w/ enclosures): Moonbeam, Inc.
(w/o enclosures): Larry Miller, Esquire
Administrative Law Judge Edward Luton



ALEX BROWN & SONS
INCORPORATED

ACCOUNT 247-16120

TAX ID 555-72-1568

NOVEMBER 30 - DECEMBER 31, 1991

MARY F CONSTANT
ABBIE & BIANCO RET FUND
SHOOT THE MOON
NICASIO CA 94946

YOUR INVESTMENT REPRESENTATIVE IS:

J LANGWITH MANION, JR
345 CALIFORNIA ST. 24TH FLOOR
SAN FRANCISCO CA 94104
IR# 247-068 PHONE 415-544-2800
TOLL FREE (800) 334-2640

MONEY MARKET FUND 7 DAY AVERAGE YIELDS

ALEX. BROWN CASH RESERVE PRIME	4.12%
ALEX. BROWN CASH RESERVE TREASURY	4.22%
ALEX. BROWN CASH RESERVE TAX FREE	4.19%

EXHIBIT 3

0992-102-65

STAMP & RETURN
COPY

LAW OFFICES

H. J. ...

AMENDMENT

Please amend the pending application (FCC Form 301) of Moonbeam, Inc. (File No. BPH-911115MG), for a construction permit for a new commercial FM broadcast station on FM Channel 265 (100.9 MHz) at Calistoga, California, in the following respects:

Section II, Page 2 (FCC 301, Page 3): Delete the Section II, Page 2 (FCC 301, Page 3), previously submitted and substitute in lieu thereof the amended Section II, Page 2 (FCC 301, Page 3), that is submitted herewith.

Section II, Page 3 (FCC 301, Page 4): Delete the Section II, Page 3 (FCC 301, Page 4), previously submitted and substitute in lieu thereof the amended Section II, Page 3 (FCC 301, Page 4), that is submitted herewith.

Section III (FCC 301, Page 6): Delete the Section III (FCC 301, Page 6) previously submitted and substitute in lieu thereof the amended Section III (FCC 301, Page 6) that is submitted herewith.

Sections VI and VII (FCC 301, Page 24): Delete the Sections VI and VII (FCC 301, Page 24), previously submitted and substitute in lieu thereof the amended Section VI and VII (FCC 301, Page 24) that is submitted herewith.

Exhibit No. 1: Delete the Exhibit No. 1 previously submitted and substitute in lieu thereof the amended Exhibit No. 1 that is submitted herewith.

Exhibit No. 3: Delete the Exhibit No. 3 previously submitted and substitute in lieu thereof the amended Exhibit No. 3 that is submitted herewith.

Section V-B: Delete the Section V-B and related engineering exhibits that were previously submitted and substitute in lieu thereof the amended Section V-B and related amended engineering exhibits that are submitted herewith.

CERTIFICATION

I, the undersigned, hereby certify that the statements contained in this amendment are true, complete and correct, to the best of my knowledge and belief, and are made in good faith.

Signed and dated this 27 day of February, 1992.

MOONBEAM, INC.

By Mary Constant
Mary Constant, President

ON III - FINANCIAL QUALIFICATIONS

2. If this application is for a change in an operating facility do not fill out this section.

The applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue.

☒ Yes ☐ No

2. State the total funds you estimate are necessary to construct and operate the requested facility for three months without revenue.

\$ 95,000

3. Identify each source of funds, including the name, address, and telephone number of the source (and a contact person if the source is an entity), the relationship (if any) of the source to the applicant, and the amount of funds to be supplied by each source.

Source of Funds (Name and Address)	Telephone Number	Relationship	Amount
Mary F. Constant Shoot the Moon Nicasio, CA 94946	415/662-2226	Self	\$100,000

EXHIBIT 4

FILE COPY
STAMP & RETURN

BEFORE THE

Federal Communications Commission

In re Applications of WASHINGTON, D.C. 20554 MM DOCKET NO. 93-42

MOONBEAM, INC.

File No. BPH-911115MG

GARY E. WILLSON

File No. BPH-911115MO

For a Construction Permit
New FM Station on CHannel 265A
in Calistoga, California

RECEIVED

APR 15 1993

To: The Honorable Edward Luton
Administrative Law Judge

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

FIRST REQUEST FOR PRODUCTION OF SUPPLEMENTAL
DOCUMENTS FROM MOONBEAM, INC.

Garry Willson (Willson) pursuant to Rule 1.325(a) and 1.325(c) requests that Moonbeam produce the documents described in Exhibit A attached. This request for supplemental documents is submitted within 10 days of receipt of documents produced by Moonbeam pursuant to the standard document production order. This request arises from a need to further supplement documents already produced by Moonbeam or to obtain relevant documents not produced. This request is strictly supplemental. Any document previously produced or identified in a prior claim of privilege need not be produced or identified.

Respectfully submitted,

GARY E. WILLSON

GAMMON & GRANGE, P.C.
8280 Greensboro Drive
Seventh Floor
McLean, VA 22102-3807
(703) 761-5000

By A. Wray Fitch III
A. Wray Fitch III
His Attorney

April 15, 1993

Federal Communications Commission with respect to any broadcast station, low power television station, multi-point distribution service, or direct broadcast satellite.

19. All documents relating to the costs of operating applicant's proposed radio station or of prosecuting its application.

20. All documents relating to the costs of constructing applicant's proposed radio station.

21. All documents relating to the source and availability of funds to prosecute the Moonbeam application or construct or operate applicant's proposed radio station.

22. The most current financial statement* prior to March 2, 1992 of Mary F. Constant or Mary F. Constant and Fred Constant, her husband.

23. The most current financial statement* prior to November 14, 1991 (the date the Moonbeam, Inc. application was filed) of Mary F. Constant or Mary F. Constant and Fred Constant, her husband.

24. Any agreement to provide funds by Mr. A. Langwith Manion or Alex Brown & Sons to either Mary Constant or Moonbeam, Inc. for the purpose of providing funds for the prosecution, construction or operation of the proposed station.

25. Any financing agreement or agreement to loan funds or provide funds between any individual or entity and Moonbeam, Inc. or Mary Constant for the purpose of providing funds for the

* "Financial Statement" is defined as a financial statement or other similar documents which separately or in combination reveal liabilities and assets.